K Rajashekar a/l Kanapathy & Ors v Palm Court Condominium & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S21–261 OF 2009
SM KOMATHY JC
6 JANUARY 2014

Civil Procedure — Pleadings — Statement of claim — Amendment of — Plaintiffs sought to reformulate whole case against deceased — Application made some four years after filing of suit — Whether long delay — Whether delay in making application fatal — Whether delay explained — Whether deceased would be unfairly prejudiced if application allowed — Whether application was not made bona fide — Whether proposed amendment would turn suit from one character into a suit of another and inconsistent character — Principles applicable in amendment of pleadings — Rules of Court 2012 O 20 r 5

The deceased, the late Wong Tuck Onn, was the owner of three commercial lots in Palm Court Condominium who had partitioned these lots and rented them to the plaintiffs who were carrying on their business in the condominium. When the Joint Management Body (JMB) for Palm Court Condominium took charge of the management of the condominium from the developer, the main entrance to the condominium that was opposite Jalan Sultan Abdul Samad was closed, and was moved to the gate opposite Jalan Berhala. This move adversely affected the business of the plaintiffs as their customers no longer had easy access to their shops. The plaintiffs were served with notices from Dewan Bandaraya Kuala Lumpur (DBKL) requiring them to demolish the partitions. The plaintiffs instituted this action against the JMB and its 11 committee members, DBKL, the developer of the condominium and the estate of the deceased (the 15th defendant) for damages and loss suffered as a result of the closure of the main entrance along Jalan Sultan Abdul Samad by JMB. The plaintiffs also made application for a mandatory injunction, inter alia, to restrain DBKL and JMB from demolishing the partitions put up by the deceased. As the application was not served on the developer and the 15th defendant, the court dismissed the injunction application as well as the plaintiffs' claim against DBKL, JMB and its committee members. Following the dismissal of the action against the other defendants, the plaintiffs proceeded with their claim against the remaining defendants, the developer and the 15th defendant, after a lapse of about three years. The 15th defendant filed an application to strike out the plaintiffs claim on the grounds, inter alia, that the statement of claim did not disclose a cause of action against the deceased. This led to the plaintiffs' filing the present application to amend their statement of claim. By the proposed amendments,

the plaintiffs sought a declaration that the tenancy agreements were null and void ab initio for illegality and claimed for restitution under s 66 of the Contracts Act 1950. They sought, inter alia, the refund of all rentals paid to the deceased. The 15th defendant strongly opposed this application on the following grounds: (a) there was inordinate delay; (b) the application was not made bona fide, and (c) that it would turn the suit from one character into a suit of another and inconsistent character.

Held, dismissing the application with costs:

(1) The court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it. The later an application is made, the stronger would be the grounds required to justify it. The delay must be explained and justified. A failure to explain the delay is fatal especially where the amendments sought are substantial in nature. Last minute applications are to be discouraged as they would inevitably entail an adjournment, and an award of costs may not adequately compensate someone who is desirous of concluding a piece of litigation which has been hanging over his head (see para 27).

(2) The present application was made some four years after the filing of this suit. There had been a long delay. The law requires that any delay in the making of an application to amend a pleading must be explained. There was a glaring omission by the plaintiffs to offer any explanation in their affidavit the reasons as to why the application was made at this extraordinarily late stage. The plaintiffs had four years from the date of the filing of this action to work on and reformulate their claim against the deceased. The statement of claim as drafted did not indicate with sufficient clarity the basis of the claim against the deceased. The plaintiffs, instead of amending their claim at the earliest opportunity, inexplicably went into hibernation and led the 15th defendant to believe they were disinterested in pursuing the claim and had abandoned the claim. The plaintiffs' conduct, to say the least, was lamentable. The court should not countenance the inaction of the plaintiffs. In light of the abject failure of the plaintiffs to give an explanation for the late application, the application must be rejected. The 15th defendant would be unfairly prejudiced if the application was allowed (see paras 29–30).

(3) The proposed amendments if allowed would turn the suit from one character into a suit of another and inconsistent character. The original claim was for damages for the actions of the JMB in moving the main entrance. By the proposed amendments the plaintiffs sought to have the tenancy agreements declared null and void. Applying the dictum of Mohd Azmi FCJ in *Yamaha Motors Co Ltd v Yamaha (Malaysia) Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428, this was not permissible.

The plaintiffs' claim for damages would be converted into a claim for rescission of the agreements based on a completely different factual structure. The court should be assiduous to prevent an abuse of the process of court by those who are tardy and indolent (see para 35).

[Bahasa Malaysia summary

Si mati, mendiang Wong Tuck Onn, merupakan pemilik tiga lot komersil di Palm Court Condominium yang telah membahagikan lot-lot ini dan menyewakannya kepada plaintif-plaintif yang menjalankan perniagaan mereka di kondominium tersebut. Apabila Pengurusan Badan Bersama ('PBB') bagi Palm Court Condominium mengambil alih pengurusan kondominium daripada pemaju, pintu masuk utama kondominium yang berada bertentangan Jalan Sultan Abdul Samad telah ditutup, dan dialihkan ke pintu masuk Jalan Berhala. Langkah ini menjejaskan perniagaan plaintif-plaintif kerana pelanggan-pelanggannya tidak lagi mempunyai akses mudah kepada kedai-kedai. Plaintif-plaintif disampaikan dengan notis-notis daripada Dewan Bandaraya Kuala Lumpur ('DBKL') yang memerlukan mereka merobohkan pembahagi-pembahagi tersebut. Plaintif-plaintif memulakan tindakan ini terhadap PBB dan 11 orang ahli jawatankuasanya, DBKL, pemaju kondominium dan estet si mati ('defendan ke-15') bagi kerugian yang dialaminya akibat penutupan pintu utama sepanjang Jalan Sultan Abdul Samad oleh PBB. Plaintif-plaintif juga membuat permohonan bagi injunksi wajib, antara lain, untuk menghalang DBKL dan PBB daripada merobohkan pembahagi-pembahagi yang dibina oleh si mati. Oleh kerana permohonan tersebut tidak disampaikan kepada pemaju dan defendan ke-15, mahkamah menolak permohonan injunksi dan juga tuntutan plaintif-plaintif terhadap DBKL, JMB dan ahli-ahli jawatankuasannya. Berikutan penolakan tindakan terhadap defendan-defendan yang lain, plaintif-plaintif meneruskan dengan tuntutan mereka terhadap defendan-defendan selebihnya, pemaju dan defendan ke-15, selepas luputnya tiga tahun. Defendan ke-15 memfailkan permohonan untuk membatalkan tuntutan plaintif-plaintif atas alasan, antara lain, bahawa penyata tuntutan tidak mendedahkan kausa tindakan terhadap si mati. Ini membawa kepada plaintif-plaintif memfailkan permohonan ini untuk meminda penyata tuntutan mereka. Melalui pindaan yang dicadangkan, plaintif-plaintif memohon deklarasi bahawa perjanjian-perjanjian sewaan tersebut adalah batal dan tidak sah *ab initio* kerana ketaksahan dan menuntut bagi restitusi di bawah s 66 Akta Kontrak 1950. Mereka memohon, antara lain, pemulangan semua sewaan yang dibayar kepada si mati. Defendan ke-15 menentang permohonan ini dengan tegas atas alasan bahawa; terdapat kelewatan melampau; permohonan tidak dibuat secara

bona fide; dan ia akan mengubah guaman daripada satu sifat kepada satu guaman yang lain dan tidak bersifat konsisten. A

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah sepatutnya dan seharusnya tidak dengan mudah untuk membenarkan pindaan lewat daripada masa sebelumnya, dan beban yang berat terletak kepada pihak yang memohon untuk membuat pindaan lewat untuk memberi justifikasi. Lebih lewat satu permohonan dibuat, lebih kukuh alasan yang diperlukan untuk memberi justifikasi. Kelewatan mestilah dijelaskan dan dijustifikasikan. Kegagalan untuk menjelaskan kelewatan adalah menjejaskan khasnya dalam mana pindaan yang dipohon adalah besar. Permohonan pada minit terakhir adalah tidak digalakkan kerana ia akan membawa kepada satu penangguhan dan award kos mungkin tidak akan memampas secukupnya seseorang yang berkehendak untuk menyimpulkan satu litigasi yang telah tergantung (lihat perenggan 27). B C D

(2) Permohonan ini dibuat empat tahun selepas pemfailan guaman ini. Terdapat kelewatan melampau. Undang-undang mengkehendaki agar sebarang kelewatan dalam membuat permohonan meminda satu-satu pliding diperjelaskan. Terdapat ketinggalan jelas oleh plaintif-plaintif untuk mengemukakan penjelasan dalam afidavit mereka alasan-alasan mengapa permohonan dibuat pada peringkat yang luar biasa lewat. Plaintif-plaintif mempunyai empat tahun dari tarikh pemfailan tindakan ini untuk membentuk dan merangka semula tuntutan mereka terhadap si mati. Penyata tuntutan seperti yang dirangka tidak menyatakan dengan cukup jelas mengenai asas tuntutan terhadap si mati. Plaintif-plaintif, yang sepatutnya meminda tuntutan mereka pada peluang terawal, tanpa sebarang alasan berdiam diri dan menyebabkan defendan ke-15 percaya bahawa mereka tidak berminat untuk meneruskan tuntutan dan telah mengabaikan tuntutan. Tindakan plaintif-plaintif, untuk menyatakan paling tidak, adalah tidak memuaskan hati. Mahkamah tidak menyokong tindakan plaintif-plaintif. Berdasarkan kepada kegagalan plaintif-plaintif untuk memberi penjelasan bagi permohonan lewat, permohonan sewajarnya ditolak. Defendan ke-15 akan diprejudiskan secara tidak adil sekiranya permohonan dibenarkan (lihat perenggan 29–30). E F G H

(3) Pindaan yang dicadangkan jika dibenarkan akan mengubah guaman daripada satu sifat kepada satu guaman lain dan bersifat tidak konsisten. Tuntutan asal adalah bagi ganti rugi bagi tindakan PBB dalam mengalihkan pintu utama. Melalui pindaan yang dicadangkan, plaintif-plaintif memohon agar perjanjian-perjanjian sewaan diisytiharkan sebagai tak sah dan terbatal. Mengunapakai dictum Mohd Azmi FCJ dalam kes *Yamaha Motors Co Ltd v Yamaha (Malaysia) Sdn Bhd* I

& Ors [1983] 1 MLJ 213, ini tidak dibenarkan. Tuntutan plaintif-plaintif bagi ganti rugi akan berubah kepada tuntutan restitusi perjanjian-perjanjian berdasarkan struktur fakta yang berbeza. Mahkamah haruslah memberi perhatian untuk mengelakkan penyalahgunaan proses mahkamah oleh mereka yang lewat dan leka (lihat perenggan 35).]

Notes

For cases on statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6580–6622.

Cases referred to

Everise Hectares Sdn Bhd v Citibank Bhd [2010] MLJU 1379; [2011] 2 CLJ 25, CA (refd)

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230; [1987] 1 CLJ 126, SC (folld)

Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd [2001] 1 MLJ 297; [2000] 4 CLJ 281, HC (folld)

Ketteman v Hansel Properties Ltd [1988] 1 All ER 38, HL (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

Stadco Sdn Bhd v Woolley Development Sdn Bhd [2013] 6 MLJ 297; [2013] 1 LNS 483, CA (refd)

Yamaha Motors Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] CLJ Rep 428, FC (not folld)

Legislation referred to

Contracts Act 1950 s 66
Rules of Court 2012 O 20 r 5
Street, Drainage and Building Act 1974 s 79

Susielan (K Maheswari with her) (Susielan & Assoc) for the plaintiff.
Amirta Mcpirapu (Muhendaran Sri) for the defendant.

SM Komathy JC:

[1] The first to the eighth plaintiffs applied to amend their statement of claim dated 17 September 2009 pertaining to assertions made against the 15th defendant. The application is supported by the affidavit of Sugumaran a/l Nagapen affirmed on 25 October 2013. The 15th defendant opposed the application on procedural and substantive grounds.

THE FACTS

[2] The factual matrix relevant to this application is as follows. The late

Wong Tuck Onn ('the deceased') was the owner of three commercial lots in Palm Court Condominium in Brickfields, Kuala Lumpur. He partitioned these lots and rented them out to the plaintiffs. The tenancy agreements between the deceased and the plaintiffs were entered into at different times between 1998 and 2002. The agreements expired in 2004 and thereafter the plaintiffs became monthly tenants.

[3] The plaintiffs continued to carry on business in the condominium without any disturbances until the establishment of the Joint Management Body ('JMB') for Palm Court Condominium on 26 January 2008.

[4] When the JMB took charge of the management of the condominium from the developer, it introduced numerous changes. In April 2008, the main entrance to the condominium that was opposite Jalan Sultan Abdul Samad was closed, and was moved to the gate opposite Jalan Berhala. This move adversely affected the business of the plaintiffs as their customers no longer had easy access to their shops. By letter dated 10 June 2008, of the Dewan Bandaraya Kuala Lumpur ('DBKL') informed the deceased that the partitions had been put up illegally and required him to either submit the requisite plans for approval or to demolish them.

[5] The deceased passed away on 16 March 2009, and on 26 August 2009, the plaintiffs were served with notices from DBKL under s 79 of the Street, Drainage and Building Act 1974 requiring them to demolish the partitions.

[6] On 17 September 2009, the plaintiffs instituted this action against the JMB and its 11 committee members, DBKL, the developer of the Condominium and the estate of the deceased ('the 15th defendant') for damages and loss suffered as a result of the closure of the main entrance along Jalan Sultan Abdul Samad by JMB. On the same day, an application was made by the plaintiffs for a mandatory injunction, inter alia, to restrain DBKL and JMB from demolishing the partitions put up by the deceased. The application was not served on the developer and the 15th defendant. On 16 June 2010, the court dismissed the injunction application, and also the plaintiffs' claim against DBKL, JMB and its committee members. With the dismissal of the claim against these defendants, only the plaintiffs' claim against the developer and the 15th defendant remained.

[7] Following the dismissal of the action against the other defendants the plaintiffs took no action to proceed with their claim for a period of about three years. Then by letter dated 22 April 2013, the plaintiffs' solicitors notified the court that the claim against the developer and the 15th defendant was still pending and requested for a case management hearing. During case management, directions were given and the case was fixed for hearing on

13 and 14 November 2013. The court was informed that the 15th defendant would be filing an application to strike out the plaintiffs' claim.

[8] On 6 September 2013, 15th defendant filed an application to strike out the plaintiffs' claim on the grounds, inter alia, that the statement of claim did not disclose a cause of action against the deceased. This led to the plaintiffs' filing the present application on 25 October 2013, to amend their statement of claim.

THE PLAINTIFFS' CLAIM

[9] The plaintiffs' claim against the 15th defendant can be seen from the facts pleaded from paras 77–82 of the statement of claim. They are in these terms:

> 77 Plaintif-plaintif mendakwa bahawa berdasarkan kepada perjanjian penyewaan yang telah dilaksanakan oleh plaintif pertama, plaintif kedua, plaintif ketiga, plaintif keempat, plaintif kelima dan plaintif ketujuh dengan mendiang Wong Tuck Onn, simati, plaintif-plaintif telah diberikan representasi bahawa mendiang, Wong Tuck Onn si mati adalah pemilik beneficial unit-unit komersial dan bahawa unit-unit komersial tersebut telah diluluskan oleh pihak-pihak berkenaan.
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> 78 Plaintif-plaintif juga menyatakan bahawa ianya adalah representasi mendiang Wong Tuck Onn si mati bahawa pembangunan oleh defendan keempat belas adalah juga unit komersial do Blok B dan ianya telah mendapat kelulusan pihak-pihak berkenaan.
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> 79 Pada setiap masa, plaintif-plaintif telah hanya memasuki dengan perjanjian penyewaan atas representasi bahawa ianya adalah bersemuka dengan Jalan Sultan Abdul Samad dan bahawa tidak akan terdapat sebarang gangguan daripada mana-mana pihak dan perniagaan dapat dijalankan dengan lancar.
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> 80 Pihak plaintif-plaintif semenjak penyewaan unit perniagaan komersial telah membuat bayaran sewa dengan tetap dan bayaran penyenggaraan telah juga dibayar kepada defendan keempatbelas sebelum penubuhan defendan pertama atas representasi bahawa premis yang disewa adalah satu unit komersial yang sah dan sekatan dalaman adalah mengikut undang-undang.
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> 81 Disebabkan oleh tindakan defendan pertama hingga defendan ketiga belas di atas, ianya telah menjejaskan perjalanan perniagaan-perniagaan plaintif-plaintif dan kini sekiranya Defendan Ketigabelas tidak di haling, Plaintif-plaintif tidak akan dapat meneruskan dengan perniagaan mereka. Dalam keadaan sedemikian, plaintif-plaintif telah mengalami kerugian ketara iaitu kerugian langsung dan tidak langsung yang akan dihuraikan diperbicaraan kelak akibat representasi salah yang diberikan mendiang Wong Tuck Onn, si mati.
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> 82 Maka dengan itu, plaintif-plaintif menuntut gantirugi daripada defendan ke empat belas dan defendan kelima belas bagi kerugian yang dialami akibat tindakan-tindakan defendan pertama hingga defendan ketiga belas seperti dihuraikan di atas.

The prayer for relief sought damages as follows:

> 85 Ganti rugi am untuk ditaksirkan oleh mahkamah berkenaan kehilangan keuntungan perniagaan disebabkan representasi bahawa premis unit perniagaan akan bersemuka dengan Jalan Sultan Abdul Samad.
>
> (a) Faedah terhadap perenggan (a) di atas pada kadar 8% setahun daripada tarikh pemfailan writ saman sehingga penyelesaian penuh;
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> (b) Ganti rugi khas yang akan dihuraikan pada masa perbicaraan kelak akibat kerugian keuntungan profit berkenaan perniagaan disebabkan dengan tindakan defendan pertama menubahsuaikan kedua-dua pintu keluar masuk utama utama daripada bersemuka Jalan Sultan Abdul Samad kepada bersemuka dengan Jalan Berhala; dan
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> (c) Faedah terhadap perenggan (c) di atas pada kadar 8% setahun daripada tarikh pemfailan writ saman sehingga penyelesaian penuh.

[10] In light of para 82 of the claim, it is clear that the plaintiffs' claim against the deceased for damages is grounded or arises from the actions of the first to the 13th defendants in closing the main entrance to the condominium.

THE PROPOSED AMENDMENTS

[11] The plaintiffs proposed to amend paras 77, 78 and 79 of the statement of claim by deleting the words representation and substituting it with 'misrepresentation' and alleging breach by the 15th defendant.

[12] The plaintiffs also proposed to add new paras 80, 82, 84 and 85 to, inter alia, state that the deceased had given assurances to the plaintiffs' and their solicitors that the partitions put up by him were legal.

[13] The plaintiffs also proposed to amend the prayer for relief to include an order for a declaration that the tenancy agreements entered by the plaintiffs' with the deceased were null and void since the partitions were illegal.

[14] The plaintiffs also sought to amend the claim for special damages to seek the return of all rentals paid by the plaintiffs' to the deceased amounting to RM761,778 from 2000 to 2010.

[15] The plaintiffs also proposed to add a further item of special damages amounting to RM428,997.87 as loss of profits.

[16] The object of the amendments, in a nutshell, was to plead an alternative case based on misrepresentation that the partitions had been erected without

the approval of DBKL.

SUBMISSIONS OF PARTIES

[17] The plaintiffs contended that O 20 r 5 of the Rules of Court ('ROC') empowered the court to allow all amendments that are necessary to reflect the real dispute between the parties. It was pointed out that the relevant provision expressly allowed the application to be made at any stage of the proceedings as any prejudice occasioned by the amendments could be compensated by an order of costs.

[18] It was contended that the proposed amendments sought in this application were necessary to reflect the real issues in dispute between the parties which concerned the validity of the tenancy agreements entered into between the plaintiffs and the deceased. It was further contended that the proposed amendments would not prejudice the 15th defendant as it would not introduce any new facts or raise any new cause of action.

[19] The 15th defendant strongly opposed this application on two grounds, namely:

(a) there was inordinate delay;

(b) the application was not made bona fide; and

(c) that it would turn the suit from one character into a suit of another and inconsistent character.

GENERAL PRINCIPLES ON AMENDMENT OF PLEADINGS

[20] Order 20 r 5 is silence as to the principles which the court should apply in exercising its discretion as to whether an amendment should be permitted. There is however substantial case law that has laid down the principles to be applied in the amendment of pleadings. The two leading authorities on the principles to be applied in an application to amend a pleading are *Yamaha Motors Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428 at p 215 at p 429, and *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; [1987] 1 CLJ 126. In the formal case, Mohd Azmi FCJ articulated the principles as follows:

> Under O 20 of the Rules of the High Court, which is equivalent to O 28 Rules of Supreme Court, a judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248). The general principle is at the Court will allow such amendments as will cause no injustice to the other parties. The basic

question should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[21] In the latter case, the Supreme Court held:

As for general principles for the granting of leave to amend: 'It is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made 'for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Bakar Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216 at p 1231; [1958] 3 All ER 540 at p 546).

It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right (per Bowen LJ in *Cropper v Smith* (1883) 26 Ch D 700, at pp 710-722, with which observations AL Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co v Cultam* [1896] 1 Ch 108, at p 112).

[22] The two authorities establish the general rule that the amendments may be allowed at any stage of the proceedings, including post-judgment as it is a matter of discretion, no hard and fast rules may be laid down. But at the end of the day the court must balance it against the justice of the case.

LATE APPLICATIONS TO AMEND PLEADINGS

[23] There are numerous authorities providing guidance on the approach to be taken in dealing with late applications to amend pleadings. I start with the oft quoted case of *Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd* [2001] 1 MLJ 297; [2000] 4 CLJ 281. In refusing an application made to amend a statement of claim two years after its institution, the court rejected a submission that an amendment should be allowed at almost any time. Hishamuddin Yunus J (as he then was) explained:

In my judgment, it is the law that where there has been a long delay in applying for leave to amend a pleading, there must be an affidavit to explain the delay; except in cases where the amendment is plainly and obviously trivial in nature or where the

A opposite party does not oppose the application. Only if there is an explanation by way of an affidavit will the court be in a position to assess and decide whether in the circumstances leave to amend ought to be granted or not (see *Lembaga Pelabuhan Johor v The Pacific Bank* [1998] 5 MLJ 323; [1998] 1 CLJ 742 (refd) and *Taisho Co Sdn Bhd v Pan Global Equities & Anor* [1999] 1 MLJ 359; [1999] 1 CLJ 703

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[24] In *Everise Hectares Sdn Bhd v Citibank Bhd* [2010] MLJU 1379; [2011] 2 CLJ 25, the Court of Appeal echoed the same view in relation to a late application to amend an originating summons.

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[25] The Court of Appeal in a recent case in *Stadco Sdn Bhd v Woolley Development Sdn Bhd* [2013] 6 MLJ 297; [2013] 1 LNS 483, expressly endorsed the principle laid down in *Kaplands*. It and said (at 304):

D Clearly, it would be prejudicial to the respondent if the proposal to amend were to be allowed at this very late stage of the proceeding. The case law authorities on delay in making an application to amend pleadings are clear, especially where the delay is substantial and the excuse given is weak (see *Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd* [2001] 1 MLJ 297; [2000] 4 CLJ 281; *Bacom Enterprise Sdn Bhd v Jong Chuk* [1998] 2 MLJ 301; [1998] 2 CLJ 11; and *Kettleman* E *v Hansel Properties Ltd* [1998] 1 All ER 38). A litigant cannot be allowed to amend his pleading at anytime he likes at his whims and fancy.

[26] On the same subject, the House of Lords in *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38 expressed the same view. Lord Griffiths who delivered F the principal speech for the majority said (at p 62):

Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh G in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other …

Another factor that a judge must weigh in the balance is the pressure on the courts H caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the I lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings

[27] The authorities discussed above make it clear that the court is and should be less ready to allow a very late amendment than it used to be in former

times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it. The later an application is made, the stronger would be the grounds required to justify it. The delay must be explained and justified. A failure to explain the delay is fatal especially where the amendments sought are substantial in nature. Last minute applications are to be discouraged as they would inevitably entail an adjournment, and an award of costs may not adequately compensate someone who is desirous of concluding a piece of litigation which has been hanging over his head.

WHETHER THE DELAY IN MAKING APPLICATION FATAL

[28] Turning to consider the facts relied on in support of the present application. I find that the amendments sought by the plaintiffs in this application are not trivial or minor. It seeks to reformulate the whole case against the deceased. Originally, the claim against the deceased was essentially for damages for the closure of the main entrance at Jalan Abdul Samad. By the proposed amendments, the plaintiffs seek a declaration that the tenancy agreements are null and void ab initio for illegality and claim for restitution under s 66 of the Contracts Act 1950. They seek, inter alia, the refund of all rentals paid to the deceased.

[29] The present application is made some four years after the filing of this suit. There has been a long delay. The law requires that any delay in the making of an application to amend a pleading must be explained. There is a glaring omission by the plaintiffs to proffer any explanation in their affidavit the reasons as to why the application is made at this extraordinarily late stage. The plaintiffs had four years from the date of the filing of this action to work on and reformulate their claim against the deceased. The statement of claim as drafted did not indicate with sufficient clarity the basis of the claim against the deceased. The plaintiffs, instead of amending their claim at the earliest opportunity, inexplicably went into hibernation and led the 15th defendant to believe they were disinterested in pursuing the claim and had abandoned the claim. The plaintiffs conduct, to say the least, was lamentable. The court should not countenance the in action of the plaintiffs.

[30] The plaintiffs should have appreciated the importance of pleadings and its role in a civil trial. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 the Supreme Court commented on the scant attention given by some counsel to pleadings. I quote from the well known passage in the judgment of Jemuri Serjan SCJ (as he then was) on this point:

> It does not seem necessary for us to emphasise and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our courts. It is only a question of whether counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant

or no heed at all and we must say that they do so at their peril. Recently, lapses in the strict compliance with the rules of pleadings occurred in our courts with marked frequency and we do not see how such lapses in the courts should be tolerated at the expense of the clients.

[31] In light of the abject failure of the plaintiffs to give an explanation for the late application, the court is unable to exercise its discretion in favour of the plaintiffs. The application must be rejected. The 15th defendant would be unfairly prejudiced if the application is allowed.

NATURE OF THE PROPOSED AMENDMENTS

[32] There is one final point to be considered. It was contended on behalf of the 15th defendant that the application was not made bona fide, and if allowed would turn the suit from one character into a suit of another and inconsistent character. By the proposed amendments, it was complained, the plaintiffs sought to rescind the tenancy agreements based on the illegality of the partitions and claim restitution, contrary to the original claim which was only for damages. It was pointed out that though the partitions was mentioned in the original statement of claim, they were not part of the factual structure on which the plaintiffs cause of action was based. The original cause of action was based on the closure of the main entrance by JMB.

[33] It was further contended that there is undisputable evidence that the plaintiffs knew about the unauthorised partitions even before the filing of the action. If indeed there are valid grounds to rescind the tenancy agreements, it is unlikely the plaintiffs would have waited all this time. The 15th defendant argued that the inaction of the plaintiffs demonstrated that the application is not made in good faith, and is therefore an abuse of process.

[34] The plaintiffs, in response denied that the application was not made in good faith. It was also flatly denied that the proposed amendments sought to introduce a new cause of action, and would change the character of the pleaded case. It was, according to the plaintiffs, in reality a reformulation of the original pleadings in a more comprehensible form.

[35] I agree with the 15th defendant that the proposed amendments if allowed, would turn the suit from one character into a suit of another and inconsistent character. The original claim is for damages for the actions of the JMB in moving the main entrance. By the proposed amendments the plaintiffs seek to have the tenancy agreements declared null and void. Applying the dictum of Mohd Azmi FCJ in *Yamaha Motors*, this is not permissible. The plaintiffs' claim for damages would be converted into a claim for rescission of the agreements based on a completely different factual structure. The court

should be assiduous to prevent an abuse of the process of court by those who are tardy and indolent.

CONCLUSION

[36] For the reasons given, the application is dismissed with costs.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed